Supreme Court, U.S.
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No. 86-1875

In The

Supreme Court of the United States

1987 Term

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DEWEESE NELSON REALTY, INC.,

Appellant,

v.

EQUITY SERVICES CO.

and

BEEMAN INVESTMENT CO.,

Appellees.

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On Appeal from the Supreme Court of Mississippi

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MOTION TO DISMISS

———o———

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QUESTIONS PRESENTED

1. Whether a substantial constitutional question of due process is presented when, construing Mississippi's ad valorem tax sale and redemption notice procedures together (MISS. CODE ANN. § 27-41-55 (Supp. 1985) and MISS. CODE ANN. § 27-43-3 (Supp. 1985)), notice must be given by personal service, registered mail and publication before a landowner's rights are finally extinguished by a maturing tax deed.

2. Whether Appellant's Jurisdictional Statement presents a substantial federal question in light of the fact that the constitutional question was not passed on by the Mississippi court.

3. Whether the decision of the Mississippi Supreme Court is reviewable when it is based upon adequate state grounds.

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MOTION TO DISMISS

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Pursuant to Rule 16.1(b) of the Rules of the United States Supreme Court, Appellees respectfully move this Court to dismiss this appeal for the following reasons: (i) lack of a substantial federal question, (ii) the federal question sought to be reviewed was not passed on, and (iii) the judgment rests on an adequate non-federal basis.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Mississippi is officially reported at 502 So. 2d 310 (Miss. 1987). The text of the opinion is contained in the Appendix to Appellant's Jurisdictional Statement beginning at page 20.

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STATEMENT OF JURISDICTION

Appellees concur in the Statement of Jurisdiction presented by Appellant.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appellees concur in Appellant's enumeration of MISS. CODE ANN. §§ 27-41-55 (Supp. 1985) and 21-33-63 (Supp. 1985) ("ad valorem sale statutes") as statutes involved in this appeal, but adds MISS. CODE ANN. § 27-43-3 (Supp. 1985), which states the requisite redemption notice requirements that Chancery Clerks and Municipal Clerks must provide to the property owner in connection with ad valorem tax sales ("redemption notice statute"). In pertinent part the statute states:

> The Clerk shall issue the notice to the sheriff for the county of the reputed owner's residence, if he be a resident of the state of Mississippi, and *the sheriff shall be required to serve personal notice* as summons issued from the courts are served, and make his return to the Chancery Clerk issuing same. *The Clerk shall also mail a copy* of same to the reputed owner at his usual street address, if same can be ascertained after diligent search and inquiry, or to his post office

address if only that can be ascertained, and he shall note such action on the tax sales record. The *Clerk shall also be required to publish* the name and address of the reputed owner of the property and the legal description of such property in a public newspaper of the county in which the land is located, or if no newspaper is published as such, then a newspaper having a general circulation in such county. Such publication shall be made at least forty-five (45) days prior to the expiration of the redemption period.

. . .

Notice by mail shall be registered or certified mail. In the event the notice by mail is returned undelivered and the personal notice as here above required to be served by the sheriff is returned not found, then the clerk shall make further search and inquiry to ascertain the reputed owner's street and post office address.

. . . (emphasis added)

Appellant's statement that the ad valorem sale statutes require only notice by posting and publication is technically correct. However, the ad valorem tax sale procedure must be considered as a complete process which includes the statutory right of redemption, MISS. CODE ANN. § 27-43-3. In Mississippi, the redemption notice statute requires notice to the owner by personal service, registered mail and publication before the owner can be deprived of his property. *See Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950); MISS. CODE ANN. § 27-43-3 (Supp. 1985).

In Mississippi, the ad valorem tax sale process involves two factors: the actual sale (with notice by posting and publication) and the owner's statutory right of redemption within two years after the sale (with notice by

personal service, registered mail and publication). A tax sale can not be confirmed until the two year redemption period has expired and the required notices have been given to the owner of the property as required by MISS. CODE ANN. § 27-43-3. *See Nickey v. Mississippi*, 292 U.S. 393 (1933); *Longyear v. Toolan*, 209 U.S. 414 (1907). The redemption notice must be given to the owner within one hundred eighty (180) days, but no less than sixty (60) days prior to the expiration of the two year redemption period. MISS. CODE ANN. § 27-43-1 and § 27-43-4 (Supp. 1985).

STATEMENT OF THE CASE

The issues in this case relate to the tax sale of an undeveloped lot in a subdivision located in the city of Jackson, Mississippi.

DeWeese Nelson Realty, Incorporated ("DeWeese"), purchased the property on May 30, 1978. The 1978 ad valorem taxes were paid at the time of the sale and were prorated between the seller and DeWeese. City and county ad valorem taxes on the property for 1979 were not paid when due in 1980, nor were the 1980 taxes paid when due in 1981. When the 1979 taxes went unpaid, the property was sold at a city tax sale on April 7, 1980, and again at a separate county tax sale on September 15, 1980.

DeWeese is not a casual purchaser of real estate. In fact, it owns property in several other Mississippi counties. As a sophisticated investor in real estate, it knew that every February 1 the previous year's real estate taxes were due. Not only did DeWeese know when taxes were due, but it also understood the process whereby property was

sold for non-payment of taxes and by which it could be redeemed. DeWeese's president and principal fact witness, Dewitt DeWeese, had previously redeemed property sold at a January 10, 1970, tax sale in Hinds County, Mississippi.

Pursuant to § 27-43-3, the Municipal Clerk mailed to DeWeese a redemption notice pertaining to the city tax sale. The Mississippi Supreme Court found the evidence in the present record to indicate that Dewitt DeWeese actually received the mailed notice. *DeWeese Nelson Realty, Inc. v. Equity Services Co.*, 502 So. 2d 310, 314 (Miss. 1986). The Clerk also properly published notice in an appropriate newspaper. Further, Mr. DeWeese was personally served with a copy of the redemption notice by a Hinds County Deputy Sheriff.

Prior to the maturing of the separate county tax sale, DeWeese received notice from the Hinds County Chancery Clerk. This notice was mailed to DeWeese's registered agent for service of process and was personally served upon DeWeese's agent by the sheriff.

On April 16, 1982, DeWeese paid the 1981 county ad valorem taxes to the Hinds County Tax Collector. Appellant argued in the court below that in making this payment he was attempting to pay all taxes due on the property, and that the doctrine of equitable redemption should be invoked to avoid the county tax sale. The Mississippi Supreme Court completely rejected this argument citing the fact that DeWeese knew that the 1979 taxes had not been paid, and that his receipt for the 1981 taxes clearly indicated that he had paid only the 1981 taxes. Further, the court found that DeWeese, in tendering payment for

the 1981 taxes, made no mention of the county tax sale or the redemption notice. *Id.* at 313-14. Had he done so, he would have been directed to the personnel in the Chancery Clerk's office who process such redemptions.

On the day prior to the maturing of the county tax sale, DeWeese again visited the office of the Chancery Clerk, but did not redeem the property. Thereafter, DeWeese visited the office of Mr. B. B. McClendon, attorney for Equity Services Company, purchaser at the tax sale, and indicated to him that he would not redeem the property.

DeWeese made no equitable redemption argument with respect to the city tax sale. Based on the record before it, the Mississippi Supreme Court concluded that DeWeese received actual notice of both sales and of its right of redemption before forfeiting its interest in the property. *Id.* at 314.

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THE QUESTIONS PRESENTED BY APPELLANT ARE NOT SUBSTANTIAL

I. The question presented by the Appellant is not substantial in that the Mississippi Supreme Court held that DeWeese actually received notice by mail and by personal service in accordance with MISS. CODE ANN. §§ 27-41-55 and 27-43-3 (Supp. 1985).

This Court has frequently held that constitutional issues should not be passed upon lightly when the issues may be properly disposed of through other means. *Rescue Army v. Municipal Court*, 331 U.S. 566 (1946). To imple-

ment this policy, the court has adopted rules under which it has avoided passing upon all the constitutional issues pressed upon it for decision. Following these rules, the court has not passed on constitutional issues: in broader terms than the facts to which the ruling is to be applied; in advance of a necessity of deciding them; at the urging of one who fails to show that he was injured by the statute's operation; or if the question may be avoided by a fair construction of the statute. *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1935) (Brandeis, J., dissenting). The Mississippi Supreme Court followed this reasoning in concluding that it was unnecessary to a decision in this case to reach the Appellant's constitutional claim.

It is essential to this Court's acceptance of jurisdiction over a state court decision, alleged to be reviewable on "federal question grounds", that the state court actually decide a federal question. *Herb v. Pitcairn,* 324 U.S. 117 (1945); *Durley v. Mayo,* 351 U.S. 277 (1956). This the Mississippi Supreme Court did not do. In fact, the court specifically stated that it was unnecessary to consider the constitutional issue:

> Construing MISS. CODE ANN. § 27-41-55 (Supp. 1985) and MISS. CODE ANN. § 27-43-3 (Supp. 1985) together, *notice must be given by personal service, mail, and publication before a landowner's rights are finally extinguished by the maturing of a tax deed. The evidence in the present record indicates appellant actually received notice by mail and by personal service before it was finally deprived of its property interest.*
>
> On those facts, this Court cannot find that Appellant was deprived of its property interests without due process of law. Therefore, the Court finds it unnecessary to address the merits of Appellant's constitu-

> tional issue. *Marble v. Marble*, 457 So. 2d 1342, 1343 (Miss. 1984); *Tribou v. Gunn*, 410 So. 2d 378, 380 (Miss. 1982). (emphasis added)

DeWeese Nelson Realty, Inc. v. Equity Services Co., 502 So. 2d 310, 314 (Miss. 1987).

The mere discussion of a federal question is insufficient to grant jurisdiction, since the Supreme Court reviews judgments of state courts, and not isolated statements in their opinions. *Black v. Cutter Laboratories*, 351 U.S. 292 (1956).

In concluding that DeWeese actually received notice of the tax sale under the redemption notice statute, the Mississippi Supreme Court construed state statutory law. To invoke jurisdiction of this Court, Appellant does not contend that the Mississippi Supreme Court was wrong in its state law interpretation. Instead, DeWeese contends that the constitutional challenge must necessarily be addressed even though it had notice and opportunity to prevent the termination of its property interest.

Since this court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights" *Herb v. Pitcairn, supra* P.9, at 125-26, the Court should accept the Mississippi Supreme Court's determination that it was unnecessary to reach the constitutional issue. In fact, the questions now presented by DeWeese are so insubstantial as to warrant no further review.

II. The Court should decline to note probable jurisdiction because the decision below rests on adequate and independent state grounds.

The court below did not base its opinion on federal law. The court expressly stated that the requisite notice,

both by personal service and registered mail, was given to DeWeese under applicable state statutory law, and it was therefore unnecessary to consider the constitutional issue.

Where a state court judgment rests upon two grounds, one federal and the other non-federal, this Court must refuse to note jurisdiction where the non-federal ground is independent of the federal ground and is adequate to support the judgment of the state court. *Fox Film Corporation v. Muller*, 296 U.S. 207, 210 (1935). In the case at hand, the decision of the Mississippi Supreme Court rests on such an independent and adequate state ground. The court below held that the state statutes involved provided the Appellant with adequate notice prior to termination of its property interest.

In *Michigan v. Long*, 463 U.S. 1032, 1041 (1982), it was stated that "if the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we of course, will not undertake to review the decision." The Mississippi court clearly expressed its intention to base its decision on grounds independent of federal questions.

The non-federal grounds upon which this case was decided are adequate grounds for the state court judgment. The decision below is based on the Mississippi Supreme Court's interpretation of the adequacy of the ad valorem sale statutes and the redemption notice statute as applied to DeWeese. It is the province of a state's highest court to develop its law in accordance with its needs, so long as it is cognizant of and does not attempt to evade a federal constitutional requirement. *See Minnesota v. National Tea Company*, 309 U.S. 551 (1940).

Where the non-federal ground of a state court's decision has adequate support, this Court should not inquire as to whether the rules of law applied by the state court are right or substitute its own view of what should be the better view. *See Demorest v. City Bank Farmers Trust Company,* 321 U.S. 36 (1944). *See generally Long, supra* P.12, at 1039.

Even assuming for present purposes that a federal question is involved, the case is still controlled by the settled rule that jurisdiction fails if the non-federal ground is independent and adequate to support the judgment. This principle is illustrated in the case of *Enterprise Irrigation District v. Farmers Mutual Canal Company,* 243 U.S. 157 (1917). There the Court dismissed for lack of jurisdiction a writ of error which sought to review a judgment of the Nebraska Supreme Court permitting a coal company to divert water from a river.

The appellants contended that the hearing before the Board of Irrigation had denied them due process by failing to provide notice. After determining that one of the issues resolved by the state court was whether the appellants had been denied due process and equal protection, the Court considered whether the defense of estoppel was adequate to support the judgment. The Supreme Court held that it could not be said "that the ruling upon the question of estoppel was without fair support, or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of the other grounds of the judgment". *Id.* at 165. The Court therefore concluded that it was not at liberty to inquire as to whether the ruling was right or wrong.

The circumstances in this case do not give rise to an inference that the state court has interpreted state law

with intent to deprive DeWeese of a federal right. On the contrary, the court went to great lengths to determine whether adequate notice had in fact been given to DeWeese prior to termination of its property interest. In concluding that adequate notice and opportunity to protect its property rights were in fact actually received, the court scrutinized both the municipal and county tax sales. Only then were the tax sales found to have complied with the statutory requirements.

Further, the state law as applied does not cast impediments in the path of enforcement of constitutional rights. Nor does it interfere with the vindication of these rights. Had DeWeese not received notice by mail, personal service, and publication, the court certainly could have determined whether a constitutional right to notice had been violated.

In light of the Mississippi Supreme Court's determination that it was unnecessary to address the merits of DeWeese's constitutional issue, this Court should decline further review on the basis of the judgment's adequate and independent state grounds.

CONCLUSION

Due process requires "notice reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 314 (1950). In its jurisdictional statement, the Appellant fails to frame its

question in light of all circumstances of the Mississippi ad valorem tax sale and redemption notice statutes. There is no substantial constitutional question of due process where Mississippi's ad valorem tax sale procedures require notice by personal service, registered mail and publication before a landowner's rights are finally extinguished.

Additionally, the constitutional question was properly pretermitted by the Mississippi court, since it found as a matter of fact that Appellant received notice by personal service and registered mail in two separate tax sales on the same property and still failed to exercise its statutory right of redemption. Under these circumstances, the issues in this case were properly decided by the Mississippi court and no federal question exists for review.

Mississippi has a vital interest in the collection of its tax revenues by whatever reasonable method it deems appropriate. Mississippi has adopted a tax assessment, sale and redemption procedure which accommodates its revenue raising interest in a constitutionally permissible manner. In the absence of any constitutional or substantial federal question, the Appellant's attempted appeal should be dismissed.

Respectfully submitted,

EQUITY SERVICE CO. AND
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Appellees

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